COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 052840-00**

Diamantino D. Vieira	Employee
D'Agostino Associates	Employer
Hanover Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Horan and Fabricant)

APPEARANCES
Orlando F. de Abreu, Esq., for the employee on appeal
Joseph Guerreiro, Esq., for the employee at hearing
Terence O'Neill, Esq. for the insurer

McCARTHY, J. The insurer appeals from a decision in which an administrative judge awarded the employee permanent and total incapacity benefits for an accepted back injury. Because the judge failed to make findings of fact on the issue of § 1(7A) causation raised by the insurer, we recommit the case.

The facts pertinent to the issue discussed below are as follow. The employee was employed as a stone mason. On November 30, 2000, he developed severe back pain from carrying stones while building a wall. (Dec. 6.) The insurer accepted the employee's claim for weekly incapacity benefits. Later on, the insurer filed a complaint to discontinue payments that the judge denied at a § 10A conference. The insurer appealed to a full evidentiary hearing. (Dec. 3.) The judge allowed the employee's motion to join a § 34A claim to the discontinuance proceeding. (Dec. 4.)

Mr. Vieira underwent a § 11A medical examination on August 23, 2002. The impartial physician opined that the employee had mechanical back pain with chronic strain causally related to his lifting injury at work. The doctor noted that the employee had chronic degenerative disc disease and probable superimposed reactive depression. The impartial physician considered the employee to be completely disabled from returning to work as a mason, but felt that he could do less strenuous work. The doctor

was guarded in his prognosis, stating that it was very hard to predict the long-term future for someone with degenerative disc disease. (Dec. 11-12.) The insurer raised the issue of § 1(7A) causal relationship at hearing. (Dec. 4.)

The judge credited the employee's testimony describing his pain and impairment and adopted the opinion of the § 11A physician as to his physical restrictions. The judge also adopted the opinion of the employee's vocational expert that, given his physical restrictions, the employee was unable to obtain and sustain work in the open labor market for the foreseeable future. The judge concluded that Mr. Vieira was permanently and totally incapacitated and awarded § 34A weekly benefits beginning on August 23, 2002 and continuing. The judge did not address § 1(7A). (Dec. 17-19.)

The insurer argues, among other things, that the judge erred by failing to apply the properly raised defense of § 1(7A). We agree and conclude that recommittal is appropriate. § 11C.

The relevant provision of G. L. c. 152, § 1(7A), is a familiar fixture in many of our reviewing board opinions of the past several years. It reads:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent that such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

Taking guidance from a recent opinion of a single justice of the Appeals Court in Lyons v. Chapin Center, Mass. App. Ct., No. 03-J-73 (February 16, 2005)(single justice),[1] we conclude that recommittal is appropriate in the present case for the judge to make explicit findings on all of the elements of that fourth clause of § 1(7A). As stated by the single justice, and directly applicable here:

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[1] The majority opinion in Lyons v. Chapin Center, 17 Mass. Workers' Comp. Rep. 7 (2003) has been reversed in part by the above noted decision of the single justice and should no longer be relied upon by litigants. To the extent that the single justice did not address the Lyons majority's overturning of our decisions in Wilkinson v. City of Peabody, 11 Mass. Workers' Comp. Rep. 263 (1997) and Laredo v. Beth Isreal Hospital, 14 Mass. Workers' Comp. Rep. 394 (2000), we decline to resurrect those decisions at the present time.

> There is no dispute that the employee has the burden of proof on a properly raised "major cause" defense under G. L. c. 152, § 1(7A). To the extent that an employee, by a failure to move for the introduction of additional medical testimony or otherwise, fails to convince the fact finder that [his] disability or need for treatment comes about as the result of a "major cause" attributable to a compensable injury, that employee cannot prevail in the workers' compensation context. Here, however, the administrative judge did not mention § 1(7A) in [her] decision, and [we are] left with no basis on which to assume that [she] considered the case with the employee's burden under that section in mind.

Lyons, supra, slip op. at 4. The single justice recommitted the case for further proceedings consistent with his opinion, namely, for the judge to make findings of fact addressing the application of § 1(7A) to the employee's claim. Id. at 4-5.

Therefore, we recommit the present case for the judge to make further findings of fact addressing whether the employee's degenerative disc condition is, 1) "a pre-existing condition, which resulted from an injury or disease not compensable under this chapter," which 2) "combines with" the November 30, 2000 work injury ("a compensable injury or disease") "to cause or prolong disability or a need for treatment:" and, if so, 3) whether that "compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment." § 1(7A).

We will continue to require that judges make explicit findings as to these § 1(7A) elements, where the section is appropriately raised by the insurer. See Saulnier v. New England Window and Door, 17 Mass. Workers' Comp. Rep. 453, 459-460 (2003). Addressing the necessary analysis in exquisite detail, we note that the administrative judge must first address the nature of the pre-existing condition: whether it stems from an injury or disease (see Vasquez v. Sweetheart Cup Co., 19 Mass. Workers' Comp. Rep. ___ n.4 [January 25, 2005] and cases cited) and, if so, whether it is appropriately characterized as "not compensable under [c. 152]." As to the latter inquiry, "[i]f there is medical evidence that the pre-existing condition continues to retain any connection to an earlier compensable injury or injuries, then that pre-existing condition cannot properly be characterized as 'non-compensable' for the purposes of applying the § 1(7A) requirement that the claimed injury remain 'a major' cause of disability." Lawson v. M.B.T.A., 15

Mass. Workers' Comp. Rep. 433, 437 (2001). See also Powers v. Teledyne Rodney Metals, 16 Mass. Workers' Comp. Rep. 229, 231-232 & n.2 (2002). It is the employee's burden to prove the compensable nature of the pre-existing condition in order to invalidate a § 1(7A) defense. See LaGrasso v. Olympic Delivery, 18 Mass. Workers' Comp. Rep. 48, 54-55 (2004). If the pre-existing condition is not compensable, the judge must then address the effect of its combination with the subject work injury. See Resendes v. Meredith Home Fashions, 17 Mass. Workers' Comp. Rep. 490 (2003). If the employee has not defeated § 1(7A) by successfully attacking either of these first two elements of the statute, the judge must then make findings on the last element: whether the work injury remains a major but not necessarily predominant cause of the resultant disability or need for treatment. See, e.g., Myers v. M.B.T.A., 19 Mass. Workers' Comp. Rep. ____ (January 28, 2005) and cases cited.[2]

Absent such findings on all of the fine points that apply in any given § 1(7A) case, we will recommit the case, as per the decision of the single justice in Lyons, supra.

Accordingly, the case is recommitted for further findings consistent with this opinion.[3]

So ordered.

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[2] We do note that our concern with the proper and exacting analysis under the fourth sentence of § 1(7A) is nothing new. In Defeo v. Mobil Oil Corp., 11 Mass. Workers' Comp. Rep. 199 (1997), we *reminded* the administrative judges and the workers' compensation bar:

> As we stated last year, "all industrial injuries that *do not combine* with a pre-existing non-compensable condition, as well as those that combine with a compensable pre-existing condition, are still assessed under the same 'as is' standard that has governed industrial injuries since the 1913 inception of c. 152." Robles v. Riverside Mgmt., Inc., 10 Mass. Workers' Comp. Rep. 191, 195 (1996) (emphasis in original).

[3] We summarily affirm the decision with regard to all other issues argued by the insurer. We note only that, as to the insurer's argument that the judge mischaracterized the employer's testimony describing job offers, the judge apparently did not find those offers to be in good faith, and did not credit the employer's testimony that they would be light duty and within the employee's capabilities. (Dec. 10-11, 17 n. 5.)

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William A. McCarthy
Administrative Law Judge

Filed: ***March 15, 2005***

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge